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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1089

WILLIE E. WILLIAMS,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

On Appeal From the Supreme Court of Illinois

BRIEF FOR THE APPELLEE

SUMMARY OF ARGUMENT

Illinois has adopted §1-7 (k) of the Criminal Code to provide a means whereby those persons convicted of a crime and punished by imposition of a fine, who refuse to, or cannot pay, may "work off" the fine at the rate of $5 a day while incarcerated in a jail.

Since the state of Illinois has a legitimate interest in the deterrence of crime, and the collection of the revenues which the imposition of fines produce, and since employment of the "work off" system is a rational means to effectuate this state policy, the system does not violate the Equal Protection Clause under traditional tests. The same result follows even if the test includes the element of "balancing" the advantages gained by society in the use of the system against the disadvantages to the indigent who cannot pay a fine, because the extension of the rational of *Griffin* v. *Illinois,* 351 U.S. 12 (1956) to the post-adjudication stage of fine and punishment would gravely threaten the societal interests involved not only in this area of the law, but in others, such as the bail system, as well.

INTRODUCTION

This case involves the question whether Appellant, convicted of the crime of theft and sentenced to a year in jail plus a fine of $500 and $5 costs, was denied equal protection of the laws when the State of Illinois, under §1-7(k) of the Criminal Code, sought to collect the fine and costs by incarcerating Appellant, an indigent person, until the sum of $505 was "worked off" at the rate of $5 a day.

The Brief of Appellant plunges almost immediately into an argument which "has indeed a captivating sound; it strikes the passions with a winning address."[1] The spectre of the poor man denied justice while the rich man escapes by reaching into his pocket is not only raised, but paraded, as Appellant claims deprivation "of the things that make life worth living while the man with $505 is burdened with a necessary inconvenience" (Br. 14); "subversion" of the equal protection clause (Br. 17); punishment "simply because he is an able-bodied poor person without savings" (Br. 19); and "invidious discrimination against the poor" (Br. 20).

However, bold claims of violations of fundamental constitutional protections cannot carry the case, nor should they. Equal justice for all is the lifeblood of the American judicial system; without its promise and its realization the system will die. But even the advancement of such a fundamental proposition, as this Court has recently recognized, must be considered in the context of the case.[2] And it is the *context* of this case which Appellant forgets. He recognizes not at all, or insufficiently, five important interests which surround the law of the state of Illinois alleged to conflict with the Equal Protection Clause of the Fourteenth Amendment.

First, §1-7(k) of the Illinois Criminal Code, as a deliberate expression of policy by the General Assembly of Illinois in an area—the administration of criminal justice—peculiarly within the province of the states, comes to this

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1. Millar v. Taylor (1769) 4 Burr. 2303, 2359.

2. *Cf.* Illinois v. Allen, —— U.S. —— (1970) (*concurring opinion* of Mr. Justice Brennan, 2).

Court "with a strong presumption of regularity and constitutionality."[3]

Second, the validity of incarceration to "work off" fines which are not paid has been at least implicitly recognized by this Court. See *Ex Parte Jackson*, 96 U.S. 727 (1877); *Hill* v. *Wampler*, 298 U.S. 460 (1936).[4]

Third, the history of incarceration for failure to pay a fine imposed as punishment for a criminal offense is an ancient one, dating from 12th century England.[5] While the antiquity of a practice does not, of course, insulate it from attack on constitutional grounds, steadfast legislative and judicial adherence to such a practice through the centuries is certainly relevant in assessing its legitimacy in a consti-

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3. Swann v. Adams, 385 U.S. 440, 447 (1967) (*dissenting opinion* of Mr. Justice Harlan); Salsburg v. Maryland, 346 U.S. 545, 553 (1954); Atchison, T. & S. F. R. Co. v. Matthews, 174 U.S. 96, 104 (1899).

4. Appellant attempts to avoid the force of these decisions by arguing that the equal protection claim was not raised in either case (Br. 24, ft. 20). But it has been asserted that nothing in Griffin v. Illinois, 351 U.S. 12 (1956) deprives these cases of their authority as precedent on the point. See Wildeblood v. United States, 284 F. 2d 592, 598 (D. C. Cir., 1960). The continuing vitality of the practice of incarceration in lieu of payment of fines has also been upheld by other post-*Griffin* opinions. Kelly v. Schoonfield, 285 F. Supp. 732 (Md., 1968); Winters v. Beck, 281 F. Supp. 801 (E. D. Ark., 1968); United States ex rel Privitera v. Kross, 239 F. Supp. 118 (S.D. N.Y.), aff'd., 345 F. 2d 533 (2d Cir., 1965), cert. den., 382 U.S. 911 (1965); Henderson v. United States, 189 A. 2d 132 (D.C. App., 1963). See also Cohen v. State, 173 Md. 216, 195 A. 532 (1937); Ex Parte Garrison, 297 F. 509 (S.D. Cal., 1924).

5. 2 HOLDSWORTH, A HISTORY OF ENGLAND, 43, 44, 46 (3rd ed. 1923). At common law, a fine could be imposed for a

tutional sense. *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552, 557-62 (1947); *McGowan* v. *Maryland,* 366 U.S. 420, 431-49 (1961); *McGowan* v. *Maryland,* 366 U.S. 459, 460-511 (1961) (*concurring opinion* of Mr. Justice Frankfurter); *Roth* v. *United States,* 354 U.S. 476, 482-84 (1957).

Fourth, the laws of all 50 states and the federal government *today* allow the incarceration of the indigent to

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misdemeanor either in substitution for or in addition to imprisonment. BISHOP ON CRIMINAL LAW, §940, p. 693 (9th ed. 1923). It was limited only by the prohibition of excessive fines contained in the Magna Carta and the Bill of Rights. HARRIS & WILSHERE, PRINCIPLES AND PRACTICES OF THE CRIMINAL LAW, p. 481 (London, 1936). Payment of the fine was enforced by imprisonment or by the writ of distress, or in default of distress, by imprisonment. HARRIS & WILSHERE, 559; RUSSELL ON CRIMES AND MISDEMEANORS, Vol. I, p. 217 (8th ed. 1923); 61 and 62 Vict., c. 41, §9. This procedure subsequently has been regulated by the Criminal Justice Act of 1948, [11 and 12 Geo. 6, c. 58, §14 (1) (c)]. In Regina v. Carver [1955] 1 All. E. R. 413, the Court of Criminal Appeal held that it was within the discretion of the trial court to imprison a defendant for nonpayment of a fine after he had served the maximum jail term for the offense of which he stood convicted.

Through one or both of these methods, the state was able to satisfy payment of the fine. Thus, a penalty not paid in money fell upon the person of the defendant to be discharged through labor. 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, §380, p. 449 (Haar, 1962); MAITLAND AND MONTAGUE, A SKETCH OF ENGLISH LEGAL HISTORY, pp. 19-21 (London 1915).

collect in labor that which the state cannot collect in money.[6]

The Illinois statute enforces payment of a fine by imprisonment of non-paying defendants to work off the amount due at the rate of $5 a day for a period not to exceed six months. The provisions of the other states and of the federal government vary from the Illinois statute in three significant ways—the per diem rate at which the non-paying defendant is required to work out his fine, the maximum period for which he can be incarcerated for non-payment, and the type of work provided the defendant while incarcerated. Of the fifty states, only two—Nebraska[7] and Montana[8]—have a higher per diem rate than Illinois. In addition, ten states have adopted the same $5 a day rate as Illinois.[9]

Twelve states have established a limitation on the amount of time for which a defendant may be imprisoned for non-payment.[10] Although the amount of time required

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6. Brief of the National Legal Aid and Defender Association as *Amicus Curiae* in the instant Case, Appendix A, and Title 18 U.S.C. §3565 (1964).

7. NEB. REV. STAT. § 29-2412 (1965) provides a $6 a day credit.

8. MONT. REV. CODE ANN. § 95-3202 (b) (1969) provides a $10 a day credit.

9. Alaska, Idaho, Illinois, Indiana, Maine, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, Tennessee.

10. Arizona, California, Delaware, Florida, Louisiana, Maine, Michigan, Mississippi, New York, Ohio, West Virginia, and Wisconsin.

to be served varies from a prohibition of any imprisonment beyond the maximum term of imprisonment provided for the substantive offense[11] to a blanket provision allowing imprisonment until the total amount of the fine is discharged,[12] the Illinois statute limits imprisonment for nonpayment to six months. The federal statute provides a 30 day minimum period of incarceration before a defendant may be released on a pauper's oath under the provision of Title 18 U.S.C. §3569, reflecting the general legislative determination that while the period of incarceration for nonpayment should be limited, a minimum period of service should be required.[13] Only Illinois and Maine have provided both a $5 a day rate and a limitation upon the length of imprisonment of the defendant.[14]

The unanimity of the states and the federal government revealed by this survey of current practices in the administration of criminal justice demonstrates, at the least, a *legislative* determination that such laws do not violate the Equal Protection Clause, a determination which, while not controlling, this Court cannot, and should not, ignore in weighing the validity of Appellant's argument. *Tigner* v. *Texas,* 310 U.S. 141, 145-46 (1940); *Roth* v. *United States,* 354 U.S. 476, 485 (1957). The singlehanded striking down of the laws of all states and the federal government—a result compelled by accession to the argument of Appellant

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11. Arizona.

12. Arkansas.

13. Such provisions protect the defendant from the peril of "perpetual imprisonment," Lee v. State, 118 S.E. 2d 599 (Ga. 1962), while satisfying the state's interest in enforcement of its penal sanctions.

14. Maine's limitation on imprisonment is eleven months.

—would be an assertion of power so far reaching and consequential that it ought to be approached with the utmost caution and only for the most demanding of constitutional requirements.[15]

Fifth, the interest of the states in the practice under review in this case is a most important one:

> "Although it has been estimated that fines constitute 75% of all sentences, there are no comprehensive statistical compilations to buttress the estimate. *** *Judicial Criminal Statistics* for 1936 show that fines without imprisonment constituted 21.1% of all sentences in thirty states and 5.8% of all sentences for fifteen major offenses in the same area. *** Of 1,069,929 defendants found guilty of summary offenses and misde-

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15. The impact of a decision voiding §1-7(k) of the Illinois Criminal Code is suggested by the *Commentary* to the A.B.A. Minimum Standards on Sentencing Alternatives and Procedures (Tent. Draft., pp. 119-20) (1967):

> A large percentage of those committed to local institutions have been imprisoned solely for the reason that they cannot pay a fine to which they have been sentenced. The President's Crime Commission, for example, cited a recent study of the Philadelphia County Jail which showed that sixty per cent of the inmates had been committed for nonpayment of a fine. See PRESIDENT'S COMM'N, THE COURTS 18. Another example is provided by the background research of the District of Columbia Crime Commission. The Commission examined the sentences imposed on a sample of 1183 offenders in the U.S. Branch of the Court of General Sessions. Nineteen per cent (222) of the sample were fined, and forty-seven per cent (105) of those fined were imprisoned for nonpayment. See REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 394 (1966).

> meanors in magistrates' courts in New York City in 1950, 994,036 or 92.9% were sentenced to fine only. ***The Court of Special Sessions in the same city imposed a fine as sole punishment in 47.5% of the general misdemeanor cases. ***That fines do produce considerable revenues is demonstrated by the amount of dollars collected annually in different jurisdictions."[16]

It is fair to say that many of the local courts across the country are supported almost entirely by revenue derived from the imposition of fines and costs in misdemeanor cases, especially traffic offenses. A holding that incarceration to "work off" a fine violates the Equal Protection Clause would jeopardize the ability of these courts to function, would lessen the deterrent value of the laws which they enforce and would potentially saddle them with thousands of claims of indigency, both genuine and spurious, which would have to be heard after prior litigation had established the guilt of the defendant and the necessity for the imposition of fines as punishment.

With these considerations in mind, we turn to an examination of Appellant's argument on the merits.

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16. *Note, Fines and Fining—An Evaluation,* 101 U. Pa. L. Rev. 1013, 1014, 1016, 1026 (1953).

ARGUMENT

THE ILLINOIS STATUTE COMPELLING AN INDIGENT DEFENDANT TO "WORK OFF" A FINE IMPOSED AFTER CONVICTION DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE IT RATIONALLY RELATES TO LEGITIMATE STATE ENDS WITHOUT UNNECESSARY DISCRIMINATION AGAINST THE INDIGENT.

Under the umbrella of the Equal Protection Clause of the Fourteenth Amendment, Appellant has gathered two attacks upon the validity of §1-7(k) of the Illinois Criminal Code. These are:

> (1) the statute denies equal protection of the laws because it unnecessarily discriminates against the poor without a counter-balancing, rational relationship to some legitimate state interest, that is to say, since alternative means exist to exact the payment of a fine from the poor, the state of Illinois is forbidden to employ one which carries with it the impact of incarceration under the "work-off" system (Br. 16-22);
>
> (2) the statute denies equal protection of the laws because in this case it authorizes a total period of imprisonment of 466 days for the indigent appellant while a maximum period of 365 days would be authorized for a man of means (Br. 27-29).[17]

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17. We do not reach this argument because if we are correct in our assertion that Appellant's incarceration to "work-off" the fine does not violate the Equal Protection Clause under traditional tests, then it cannot be successfully argued that the additional incarceration is the equivalent of a "sentence" of 101 days under that portion of the theft statute which contemplates imprisonment as a punishment.

Appellant says:

> ". . . the Illinois practice does not satisfy the Fourteenth Amendment because the state has available to it collection devices far less subversive of equal protection than imprisonment" (Br. 17).

As we understand it, this branch of Appellant's equal protection argument may be simply stated:

> (1) the state of Illinois has adopted a device for the collection of fines from the "indigent" by compelling them to be "worked-off" in jail at the rate of $5 a day;
>
> (2) while the collection of revenue is a legitimate state goal, means other than the "work-off" system exist to collect fines levied on the indigent;
>
> (3) these alternatives, while perhaps administratively more burdensome to the state, have a lesser impact on the poor;
>
> (4) the state is therefore compelled to adopt the alternatives since failure to do so will void the "work-off" statute on the equal protection ground that it unnecessarily discriminates against the poor.

While this argument has a seeming surface plausibility and undeniable popular appeal, it plainly runs counter to the whole course of this Court's decisions in the explication of the range of protection accorded by the Equal Protection Clause.

Appellant's fundamental error is in his assumption that the existence of what are, to him, more desirable or benign alternatives to the "work-off" system constitutionally compel the adoption of those alternatives by the state of Illinois. To the contrary, as this Court has made clear time and again, the existence of a rational relationship between

the end sought to be achieved, a legitimate state interest in that end, and the means used to achieve it, is sufficient to save a statute from attack under the Equal Protection Clause even though other means may also exist to achieve the same end, and even though this Court could be persuaded that the alternative means are wiser, fairer or more nearly in accord with advancing notions of criminal justice reform.

The guiding principles to decision in cases involving challenges to legislation under the Equal Protection Clause have been stated many times by this Court. "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 425-26 (1961). "The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins the 'equal protection of the laws,' and laws are not abstract propositions . . . but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies." *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940). "[T]he constitutional demand is not a demand that a statute necessarily apply equally to all persons. ***Hence, legislation may impose special bur-

dens upon defined classes in order to achieve permissible ends." *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966).

Under these principles, the first question to be decided is what state interests are involved in this case. Illinois, like all other states and the federal government, seeks to deter crime and punish offenders by defining criminal offenses and imposing, in some cases, fines as punishment after conviction. To say these are important state interests is to state the obvious.

The imposition of fines, however, will not serve their deterrent purpose if they are not collected, or are, under the state's scheme, uncollectable, whether by virtue of fault in legislation or by the conflict of state policy with the federal constitution. It follows, therefore, that the adoption of a law to compel the payment of fines by incarcerating those unwilling or unable to pay until they are "worked off" at a specified rate is not irrational nor discriminatory under the Equal Protection Clause if it can be shown that the interests of the state in deterring crime and collecting the revenue derived from fines are achieved by this means.[18]

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18. Nowhere in his Brief does Appellant directly dispute the proposition that the state of Illinois has essential interests at stake in the deterrence of crime by the imposition of fines and the concurrent need to enforce such deterrence, and enhance the revenue of the state by the collection of the fines or their equivalents in labor. Indeed, the validity of such interests is implicitly conceded by Appellant's extended argument concerning the wide range of choices supposedly available to Illinois to accomplish these ends without incarceration, the evils of which Appellant attempts to magnify by references to the "deplorable condition" of short term detention facilities in Illinois, which are characterized as "the lowest form of social institution on the American scene." Reference is also made to a survey

But, argues Appellant, Illinois may achieve the same ends by employing other methods of collecting the fine, none of which involve the incarceration of the defendant unable to pay immediately. It is suggested that levying against a defendant's real and personal property or pro-

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published in a Chicago newspaper which alleges that "the overwhelming majority of all Illinois jail inmates are almost completely idle" (Br. 14, ft. 9).

We assume that these references are designed to quarrel, at least subtly, with the proposition we have advanced above, i.e., that valid interests are served by the incarceration of indigents under the work-off system. But these attacks upon the operation of the work-off system are not supported by the record in this case, and, indeed, nothing in the record of this case militates against the reasonable assumption that Illinois, and other states, would not continue to employ a practice for the collection of revenue which did not, in fact, collect that revenue or its equivalent in labor. The experience in Chicago, Illinois, is revealing in this regard.

The House of Correction Jail Facility in Cook County, Illinois, houses about 1500 inmates, including those awaiting trial on criminal charges and those serving minor sentences. Between 175 and 200 of these inmates are incarcerated for non-payment of a fine. (There are no figures available on what percentage of these defendants wilfully refuse to pay their fine). They are segregated from the general prison population of the cell houses but not from those inmates who are serving minor sentences and with whom they are housed in the dormitories. Any further segregation is not feasible within the present penal system.

The House of Correction has an established work program through which it extracts in labor the value of a criminal fine from those who are unwilling or unable to pay. Under the program, non-paying defendants are assigned to jobs in the salvage yard, on the "tree project"

viding for installment payments or imposing "on an indigent a parole requirement that he do specified work during the day to satisfy the fine" are realistic alternatives. "Finally," it is said, "to the extent a defendant is unable to find work himself, the state through public employment services or public works programs is certainly bound to attempt to find it for him before remitting him to incarceration" (Br. 20-21).

Perhaps these are realistic alternatives; perhaps not. Perhaps their employment in the criminal justice system of Illinois would signal a wiser, fairer administration of the penal laws; perhaps not. The point which Appellant continues to miss is that given a rational relationship between the ends sought to be achieved by the state and the system chosen to accomplish those ends (in this case, the deterrence of crime by the imposition of fines and the collection of those fines from the indigent by the "work-off" system) the *Equal Protection Clause does not compel the state of Illinois to adopt alternatives which he, or the*

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or in the laundry or maintenance departments—all within the jail. The defendants average six or more hours of labor per day and work between five and seven days per week. The cost to the State of keeping these men (computed on a 24 hour basis) was $6.61 per day in 1969 (an increase from $6.33 per day in 1968). Although exact figures are not available, the value of the labor done by these inmates on a per diem basis is at least $11.51—the sum of the cost to the state of their upkeep and the $5.00 by which the amount of their fine is diminished per day. Illinois could not replace this labor force except at a greater cost to the State. (Letter from Daniel Weil, Acting Executive Director, Cook County Department of Corrections to James R. Thompson, Assistant Attorney General of the State of Illinois and one of the Attorneys for Appellee on the instant Brief.)

members of this Court, or counsel might choose if they sat in the General Assembly of Illinois. Nothing could be clearer than the repeated admonitions of this Court that the promulgation of alternative means for enforcing a legitimate end are not within the province of the judiciary.[19]

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19. "The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial reexamination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded," McGowan v. Maryland, 366 U.S. 420, 459, 524 (1961) (*Concurring opinion* of Mr. Justice Frankfurter); "But how are competing interests to be assessed? Since they are not subject to quantitative ascertainment, the issue necessarily resolves itself into asking, who is to make the adjustment? —who is to balance the relevant factors and ascertain which interest is in the circumstances to prevail? Full responsibility for the choice cannot be given to the courts. Courts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits. ***We are to set aside the judgment of those whose duty it is to legislate only if there is no reasonable basis for it. ***In light of their experience, the Framers of the Constitution chose to keep the judiciary dissociated from direct participation in the legislative process. ***The distinction which the Founders drew between the Court's duty to pass on the power of [the legislature] and its complementary duty not to enter directly the domain of policy is fundamental. ****Our duty to abstain from confounding policy with constitutionality demands perceptive humility as well as self-restraint in not declaring unconstitutional what in a judge's private judgment is deemed unwise and even dangerous,*" Dennis v. United States, 341

It has been suggested, however, and Appellant implicitly argues,[20] that this traditional test of equal protection is not applicable in cases where the claim is made that a "suspect" factor, such as race or wealth, accounts for the legislative classification.[21] In these cases, it is said, the obligation of the Court is to go beyond a finding that the classification is reasonably related to a valid legislative purpose:

> "A more careful articulation than that given by the Court of its role in equal protection review of state action using suspect classifications therefore appears to be that, while the Court must be satisfied, first, that the legislation has a legitimate governmental objective and, secondly, that the classification involved is reasonably related to the attainment of the legislative purpose, it must also be satisfied that the benefit to society from the state action outweighs the harm caused to those unfavorably classified. Some of the pre-*Griffin* suspect classification cases, most notably *Oyama* and *Takahashi*, seem capable of explanation only as a Court determination of the weight of com-

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U.S. 494, 517, 525, 552 (1951) (concurring opinion of Mr. Justice Frankfurter) (emphasis added); "But it is for the legislature, not the courts, to balance the advantages and disadvantages of the . . . requirement. ***It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it. ***We emphasize again what Chief Justice Waite said in Munn v. State of Illinois . . . 'For protection against abuses by legislatures, the people must resort to the polls, not to the courts'", Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 487-88 (1955).

20. Br. 21.

21. Abascal, *Municipal Services and Equal Protection: Variations on A Theme By. Griffin* v. *Illinois*, 20 HAST. L. J. 1367, 1378-82 (1969).

peting interests under this final inquiry. Even in those suspect-classification cases which can perhaps be explained on the basis of the two traditional inquiries, such as *Yick Wo* and *Kotch*, the Court has given important consideration to the question of the harm caused to those unfavorably classified. Such an inquiry would seem irrelevant under the traditional formulation of the Court's role in equal protection review.

If equal justice for rich and poor is properly regarded as one of the objectives of the equal protection clause, the Supreme Court is surely correct in considering the provision applicable where the administration of criminal justice may achieve one result for the rich and another result for the poor. Classification between rich and poor can be reasonably related to the achievement of legitimate governmental objectives. Under the standard of equal protection review which has been suggested, the appropriate inquiry then becomes whether the benefit to society from the state action outweighs the harm caused to the indigent defendant. In cases decided subsequent to *Griffin*, the Court has struggled with this question."[22]

There are a number of reasons, however, why, even assuming the applicability of this expanded test to this case, §1-7(k) does not violate the Equal Protection Clause.

First, "*Griffin* and its progeny" have never been extended beyond those stages of a criminal proceeding where the issue is guilt or innocence or the opportunity for a fair review of the trial and verdict.

It is one thing to hold that the state must pull down the financial barriers "where financial inequality produces con-

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22. Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 404, 406 (1964).

sequences of state action which differ for rich and poor although the action of the state itself is neutral"[23] and the issue is whether an indigent defendant will have the same chance to obtain appellate review as the defendant who can purchase a transcript. It is quite another to say that the Equal Protection Clause compels the adoption of a scheme which releases indigents from their obligation to "work off" an unpaid fine after trial, verdict, sentence and review.

It is one thing to hold that the cost of transcripts and appellate fees must be borne by the state. It is quite another to hold that the command of equal protection reaches so far into the post-adjudication process that we must risk the threat of destruction to the whole system of fines and the ability of the trial courts to enforce the laws which carry fines as the exclusive punishment. Even under the most expansive reading of the "balancing test", it could not be doubted that this threat to the enforcement of the criminal laws of the fifty states and the federal government does not outweigh the disadvantages to the indigent under the "work off" system.

Moreover, the threat of a holding which Appellant requests cannot be confined to the societal interests involved in the efficacy of the fine system. If it is a violation of the Equal Protection Clause to compel an indigent defendant to "work off" a fine during incarceration, then it violates equal protection to demand from the indigent the payment of monetary bail to obtain freedom from pre-trial detention.[24]

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23. *Id.* at 405.

24. The federal and state provisions which guarantee that an accused charged with a non-capital crime shall be

In every case—from traffic court to the Supreme Court of the United States—the indigent defendant would be entitled to a hearing on the question of whether there exist factors, other than the risk of pecuniary loss, which make it reasonable to assume that a defendant would be present for trial.

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admitted to bail have been interpreted by this Court as requiring that "excessive bail" may not be required. Stack v. Boyle, 342 U.S. 1 (1951). As Mr. Justice Jackson stated *in his concurring opinion*, "This is not to say that every defendant is entitled to such bail as he can provide, but he is entitled to an opportunity to make it in a reasonable amount." 342 U.S. 10.

Thus, release of a defendant pending trial is conditioned upon the payment of a reasonable amount of money. This is determined by reference to various factors only one of which is the defendant's ability to pay. This Court often has recognized the validity of other factors in restricting the right of the defendant to be free prior to trial by their effect on the amount of bail set. Such factors affect the likelihood of the defendant's appearance at trial should he be released—the gravity of the pending criminal charge and the length of the possible sentence, the defendant's age and prior criminal record, and his conduct on any prior release on bond. Stack v. Boyle, 342 U.S. 8.

Restriction of a defendant's freedom by the imposition of a financial condition for release occurs in the bail process at a stage where the defendant's interests are entitled to greater weight than in the instant case, since he has not yet been convicted of any crime. Actually, the bail situation presents a substantially harsher restriction on a defendant than does imprisonment for non-payment of a fine upon conviction of an offense because the indigent imprisoned for non-payment in Illinois receives a reasonable per diem financial credit which diminishes the amount of time which he must serve and he is protected from serving any

Second, if the test is one of balancing interests it is appropriate to inquire whether the hand of this Court should be stayed while resort is had to the legislature. Or, to put it another way, should reform in the area of monetary punishment and the indigent—if reform is required—be sought through the legislative and political processes?[25] There are two considerations involved.

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longer than six months by the limitation period included within the Illinois statute. The defendant who is incarcerated prior to trial because he is unable to make his bail is protected only by the constitutional guarantee of a speedy trial with no specification of what period of time he will actually have to serve before his trial. Yet the imposition of money bail has been upheld in the face of just such an equal protection argument as appellant attempts here. In Butler v. Crumlish, 229 F. Supp. 565, 567 (E. D. Pa. 1964), the court recognized that the "accused is not a convict, and that it is only strong necessity that compels his detention before trial," but recognized that "the differences that necessarily result from imprisonment while awaiting trial and freedom on bail cannot be made the foundation for any constitutional objection because of discrimination for the distinction is constitutionally recognized."

A holding that §1-7(k) of the Illinois Criminal Code violates the Equal Protection Clause, however, would compel a holding that monetary bail cannot be demanded of the indigent. Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 STAN. L. REV. 394, 410-12(1964); *Comment, Indigent Court Costs and Bail: Charge Them To Equal Protection*, 27 MD. L. REV. 154, 165-68(1967); *cf., Griffin* v. *Illinois*, 351 U.S. 12, 26, 29 (1956) (*dissenting opinion* of Mr. Justice Burton).

25. "Also relevant [to the balancing test] are the appropriateness of federal intervention into these local concerns, necessarily inherent in application of federal constitutional standards, and the appropriateness of judicial,

First, there is nothing in the record of this case, or in common experience, which suggests that the alternatives to the "work off" system advanced by Appellant are feasible.[26]

Second, experience in comparable areas of the criminal justice system demonstrates that the states are quite sensitive to reform when the need has been convincingly shown. In the field of pre-trial bail, for example, reform has come about, not through the compulsion of this Court in the explication of the Equal Protection Clause,[27] but through the interaction of private and community demonstration proj-

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rather than legislative, solution of these problems," *Fahringer, supra* note 24 at 410.

26. The alternatives suggested by Appellant involve costs of organization and administration which would place an additional financial burden on the State while depriving Illinois of the benefit of labor from these defendants, with no guarantee that the fine would ever be satisfied. The Appellant's suggestion of garnishment as a means of enforcing payment is unrealistic at best since it assumes that the state has the manpower and resources to find work for each non-paying defendant and that the defendant will remain on the job, earning a salary. If the defendant leaves the job, however, not only does the state lose the only *res* available to garnishment proceedings (since the defendant is by definition indigent), it then would be required to expend more money in locating the defendant, taking him into custody and returning him to the jail facility where he would then be subjected by Appellant's theory to exactly the same procedure which Illinois now employs to enforce payment of the fine.

27. *Cf.* Bandy v. United States, 82 S. Ct. 11, 13 (1961) (opinion of Mr. Justice Douglas in Chambers).

ects[28] and legislative cognizance and endorsement of their findings.[29]

This is not to say that this Court is obligated to withhold appropriate relief when it has been clearly shown that the states have no intention of complying with the plain mandate of the Constitution. It is to say, however, that a system of criminal justice which is built only upon the grudging acceptance by the states of decisions of this Court attempting to regulate every phase of the administration of criminal justice in the name of "fairness" and "wisdom" will neither work nor long endure.

The appropriate conclusion was set forth by this Court long ago in a related context:

> The sensitiveness of the . . . mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The tradition of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence.[30]

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28. See ABA Minimum Standards Relating to Pretrial Release, pp. 1-7 (Approved Draft 1968).

29. See, e.g. Ch. 38, §§110-5 to 110-7 Ill. Rev. Stat. (1969).

30. Tigner v. Texas, 310 U.S. 141, 149 (1940).

CONCLUSION

The State of Illinois requests that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

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